

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Process Reform for Executive Branch Review)	IB Docket No. 16-155
of Certain FCC Applications and Petitions)	
Involving Foreign Ownership)	

REPLY COMMENTS OF CTIA

CTIA¹ submits these reply comments in response to the Commission’s Notice of Proposed Rulemaking (“*Notice*”) seeking comment on changes to its rules and procedures for Executive Branch review of certain applications and petitions involving foreign ownership (collectively, “applications”).²

I. INTRODUCTION AND SUMMARY.

The Commission’s process reform goals center on “having the agency operate in the most effective, efficient and transparent way possible,” in order to “improve[e] the overall functioning of the agency and its service to the public.”³ The FCC Process Reform Report recommended

¹ CTIA® (www.ctia.org) represents the U.S. wireless communications industry. With members from wireless carriers and their suppliers to providers and manufacturers of wireless data services and products, the association brings together a dynamic group of companies that enable consumers to lead a 21st century connected life. CTIA members benefit from its vigorous advocacy at all levels of government for policies that foster the continued innovation, investment and economic impact of America’s competitive and world-leading mobile ecosystem. The association also coordinates the industry’s voluntary best practices and initiatives and convenes the industry’s leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

² *Process Reform for Executive Branch Review of Certain FCC Applications and Petitions Involving Foreign Ownership*, Notice of Proposed Rulemaking, FCC 16-79, IB Docket No. 16-155 (rel. June 24, 2016) (“*Notice*”).

³ Staff Working Group Report on FCC Process Reform, at 3 (rel. Feb. 14, 2014) (“FCC Process Reform Report”).

setting “reasonable timeframes” for Executive Branch review of foreign ownership issues raised in certain applications, as well as ensuring “those timeframes are met, or that the causes for any delays are clearly identified and addressed.”⁴

The record shows that there is widespread support for the following measures to streamline and improve the Executive Branch review process, consistent with the Commission’s process reform recommendations:

- Adopt a definitive timeframe for Executive Branch review.
- Standardize the Executive Branch questionnaire, subject it to notice and comment, and limit it to matters pertinent to Executive Branch review.
- Direct applicants to submit responses directly to the Executive Branch, not the FCC, for review.
- Reject the proposal to impose certifications on applicants; at most, any certification should apply only to applications with reportable foreign ownership, and must be reasonable and not exceed current U.S. law.
- Exclude from the Executive Branch review process any types of applications that do not raise national security, law enforcement, foreign policy, and trade policy concerns.

Unfortunately, the proposals set forth in the Executive Branch’s comments would undo the Commission’s efforts to improve the timeliness and transparency of the Executive Branch review process.⁵ The Executive Branch would have the Commission increase the obligations of applicants and petitioners (collectively, “applicants”) and offers no material reform to improve the timeliness of Executive Branch review.

The Commission is charged with prosecuting applications under the standards set forth in the Communications Act. As the *Notice* points out, the Commission has long held that while “its

⁴ *Id.* Recommendation 1.15.

⁵ Comments of the National Telecommunications and Information Administration, IB Docket No. 16-155 (Aug. 18, 2016) (“Executive Branch Comments”).

public interest analysis would benefit from seeking the views of the Executive Branch on [national security, law enforcement, foreign policy, and trade policy] matters as they relate to applicants with foreign ownership,” the Commission itself is responsible for “mak[ing] an independent decision on whether the grant a particular application.”⁶ It is incumbent on the Commission to ensure that the review of any applications under its jurisdiction is reasoned and comports with the Administrative Procedure Act (“APA”). The Executive Branch proposals lack sufficient justification to warrant Commission adoption under the reasoned decision-making standard of APA rulemaking.

II. THE FCC MUST ENSURE THAT ANY NEW RULES ADOPTED IN THIS PROCEEDING STREAMLINE AND IMPROVE THE EXECUTIVE BRANCH REVIEW PROCESS.

The *Notice* and the vast majority of stakeholders in this proceeding put forward many reasonable proposals to streamline and facilitate the Executive Branch review process. The Executive Branch’s proposals, however, would seemingly place applicants in a worse position relative to the existing procedures. The Executive Branch would essentially retain the existing framework where applicants are subject to an unlimited review and add new more burdensome requirements. CTIA summarizes the key reforms raised in the record and responds to the Executive Branch’s claims below.

A. The FCC Should Adopt A Definitive Timeframe For Executive Branch Review.

With the exception of the Executive Branch, commenters across the board agree that a firm timeframe should be established for Executive Branch review, in order to provide clarity and certainty to the review process.⁷ A 90-day review period as proposed in the *Notice* is

⁶ *Notice*, ¶ 4.

⁷ See, e.g., CTIA Comments at 4-6; BT Americas et al. Comments at 10-12; Hibernia/Quintillion Comments at 7-8; Incompas Comments at 4-9; Level 3 Comments at 2-10; Sprint Comments at 2-5;

reasonable and provides sufficient time for the Executive Branch to conduct its review, as evidenced by the fact that the Committee on Foreign Investment in the United States (“CFIUS”) – which includes many of the same Executive Branch agencies and staff that reviews FCC applications – conducts its review in a similar period. The Commission also would afford the opportunity for the Executive Branch to extend its review for another 90 days, for good cause.

In response, the Executive Branch asserts that its review should be open-ended because applications with foreign ownership raise complex policy and security concerns that require extensive investigation and significant resources.⁸ This conclusory argument lacks any substantive explanation, however, and is belied by the fact that CFIUS review is conducted and completed in a similar period. This proceeding should reform the current process that provides the Executive Branch with unlimited review and no accountability to the Commission or applicants, not extend it.

B. Questionnaires Must Be Standardized And Subject To Notice And Comment To Ensure They Address Only Those Matters Pertinent To Executive Branch Review.

CTIA and other commenters agree with the Executive Branch that a standardized questionnaire would help facilitate the review process,⁹ but urge the Commission to subject the questions to thorough notice and comment review.¹⁰ CTIA agrees that standardizing and making public the Executive Branch questionnaire will help make the review process more efficient and

Telstra Comments at 5-6; T-Mobile Comments at 5-8; TMT Financial Sponsors Comments at 12; USTelecom Comments at 3-5; Verizon Comments at 2-3; Wiley Rein Comments at 5-8.

⁸ Executive Branch Comments at 6, 14-17.

⁹ *Id.* at 3-4.

¹⁰ *See, e.g.*, CTIA Comments at 6-8; Incompas Comments at 9; Level 3 Comments at 14-16; Telstra Comments at 7; TMT Financial Sponsors Comments at 7-8; USTelecom Comments at 8.

transparent. Further, making sample answers publicly available, as the Executive Branch proposes, also may serve as a useful guide for applicants as they complete the questionnaire.¹¹

An in-depth notice and comment process is vital here. As many commenters point out, the types of questions that the Executive Branch suggests ought to be included in the questionnaire are outside the scope of the Executive Branch's review, which is limited to national security, law enforcement, foreign policy, and trade policy issues.¹² Moreover, a number of questions appear to be vague and overly burdensome.¹³ For example, the Executive Branch asserts the questionnaire would ask for information about applicants' long-term business plans, relationships with foreign entities, financing, lengthy lists of licenses and authorizations, and legal compliance for any and all affiliated entities and owners.

While the Executive Branch concludes that the proposed categories of questions "are clearly relevant" to its review, it does not explain how the information is in fact necessary to prevent abuses and protect U.S. communications services and infrastructure, prevent criminal activity, or preserve the ability to effectuate legal process.¹⁴ It is telling that many of the information requests proposed by the Executive Branch are not included in the initial questionnaires that the Executive Branch distributes to applicants today, which generally seek information regarding ownership; network infrastructure and security; storage and access to customer information, equipment, and facilities; the lawful intercept capabilities of the service

¹¹ Executive Branch Comments at 23.

¹² *See, e.g.*, CTIA Comments at 6-7; BT Americas et al. Comments at 13-14; Hibernia/Quintillion Comments at 6; Incompas Comments at 9-11; Level 3 Comments at 19; T-Mobile Comments at 8-11; TMT Financial Sponsors Comments at 6-8; USTelecom Comments at 7-8; Wiley Rein Comments at 11-14.

¹³ *See, e.g.*, CTIA Comments at 8; Incompas Comments at 10-11; Level 3 Comments at 19; T-Mobile Comments at 8-11; USTelecom Comments at 7-8; Wiley Rein Comments at 11-14.

¹⁴ Executive Branch Comments at 4.

provider; and the services provided. A notice and comment process would enable the Commission to fulfill its role to ensure that any rules it adopts are based on reasoned decision-making. Together with stakeholders, the FCC can fully assess the Executive Branch's proposed questions and decide the nature and extent of the obligations that the revamped FCC administrative process would impose.¹⁵

C. Applicant Responses Should Be Submitted Directly To The Executive Branch.

The record shows that it would be more efficient and effective for applicants to submit responses to the questionnaire directly to the Executive Branch.¹⁶ Preparing questionnaire responses is typically a very time-consuming and resource-intensive process. Allowing applicants to submit their responses directly to the Executive Branch would help ensure the FCC's application process is not unnecessarily lengthened or delayed by the new layer of review.

The submission of the questionnaire responses to the Executive Branch would start the 90-day review period, thus placing the burden on applicants to ensure their responses are timely submitted. The Executive Branch provides no evidence that filing responses with the Commission and having FCC staff do a completeness review improves the FCC and Executive Branch review processes, particularly given that the Commission does not currently collect or review this type of information.¹⁷

¹⁵ As CTIA previously discussed, such notice and comment should not be limited to review and approval through the Paperwork Reduction Act process, which may not fully address whether the scope of the questionnaires as proposed by the Executive Branch is appropriate and in the public interest. *See* CTIA Comments at 8.

¹⁶ *See, e.g.*, CTIA Comments at 8-9; Hibernia/Quintillion Comments at 5-6; Incompas Comments at 16-18; Level 3 Comments at 12-15; T-Mobile Comments at 11-12; TMT Financial Sponsors Comments at 8-9; USTelecom Comments at 8-9; Wiley Rein Comments at 14-15.

¹⁷ Executive Branch Comments at 4-5.

D. Any Certifications Must Be Reasonable and Not Exceed Current U.S. Law.

The record shows that the certifications proposed by the Executive Branch are inappropriate and ill-advised.¹⁸ Notably, the Executive Branch provides no meaningful rationale to impose certification requirements on any applicants, let alone its proposal to require certifications for all applicants regardless of foreign ownership.

First, it is unnecessary to require that applicants certify to compliance with the Communications Assistance for Law Enforcement Act (“CALEA”), as even the Executive Branch comments acknowledge that telecommunications service providers are already subject to CALEA.¹⁹ A desire to remind applicants that they will have CALEA requirements is not sufficient justification for adopting a new certification requirement. As a regulated entity subject to FCC oversight, service providers are expected to know and understand their obligations under CALEA and *all other regulatory requirements*. To the extent a provider is not compliant with CALEA (or any other FCC requirement), it is subject to potential enforcement action by the Commission.

Second, the Executive Branch also proposes new certifications that would require all applicants to: (1) make communications and related records available in a form and location that permits them to be subject to a lawful request or legal process in the U.S., and (2) designate points of contact that are U.S. citizens or lawful permanent U.S. residents. As commenters describe, however, these obligations raise significant concerns and add new requirements and

¹⁸ See, e.g., CTIA Comments at 11-13; BT Americas et al. Comments at 14-15; Hibernia/Quintillion Comments at 6; Incompas Comments at 12-14; Level 3 Comments at 15-18; Telstra Comments at 7-8; T-Mobile Comments at 13-14; TMT Financial Sponsors Comments at 10-11; USTelecom Comments at 9-10; Verizon Comments at 4-6; Wiley Rein Comments at 16-18.

¹⁹ Executive Branch Comments at 11.

burdens on applicants, which are not outweighed by any benefits.²⁰ Indeed, the Executive Branch's justification to impose these obligations – that some applicants have previously agreed to these terms in mitigation agreements – is not compelling.²¹ That is inadequate cause to broadly impose these new requirements on all applicants, and the Commission should not endorse the Executive Branch's proposal.

E. Certain Types Of Applications Should Be Excluded From Executive Branch Review.

Commenters widely agree that there are certain types of applications that do not raise national security, law enforcement, foreign policy, and trade policy concerns, and thus should not be subject to the Executive Branch questionnaire or referral process.²² These include, among others, *pro forma* transactions, and transactions where there have been no material changes in an applicant's ownership or circumstances since it last underwent the Executive Branch review process. The Executive Branch's claims to the contrary are unavailing. These cases should not trigger the need for updated information or change the scope of an existing mitigation agreement.²³ Moreover, reminding parties that they must comply with relevant rules and restrictions is not an appropriate basis to increase the burden on applicants, and FCC and Executive Branch staff.²⁴

²⁰ See, e.g., CTIA Comments at 11-13; BT Americas et al. Comments at 14-15; Incompas Comments at 12-14; Level 3 Comments at 17-18; T-Mobile Comments at 13-14; USTelecom Comments at 9-10; Verizon Comments at 4-6; Wiley Rein Comments at 16-18.

²¹ Executive Branch Comments at 11.

²² See, e.g., CTIA Comments at 10; BT Americas et al. Comments at 8-10; Hibernia/Quintillion Comments at 4-5; Level 3 Comments at 10-11; Sprint Comments at 5-8; Telstra Comments at 6; T-Mobile Comments at 15-16; TMT Financial Sponsors Comments at 4-6; USTelecom Comments at 6; Verizon Comments at 3-4; Wiley Rein Comments at 9-10.

²³ Executive Branch Comments at 19.

²⁴ *Id.*

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Under the APA, the Commission must adequately support and justify the adoption of new any rules or policies.²⁵ In particular, the Commission “must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”²⁶ As described above, however, the Executive Branch proposals are generally conclusory and do not provide a reasoned basis for their adoption by the FCC. The record instead clearly supports adoption of a specific timeframe for Executive Branch review, as well as other modifications discussed above that would improve and streamline the review process.

III. CONCLUSION

CTIA supports the efforts of the Commission to make the review of foreign ownership issues in international applications more efficient and transparent, consistent with the recommendations above.

Respectfully submitted,

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²⁵ 5 U.S.C. § 553.

²⁶ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), citing *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962); see also *National Tel. Coop. Ass’n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009) (explaining that the APA requires a rule be “reasonable and reasonably explained”).

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